



Bill Draft 2009-SVxz-19: Modernize Sales Tax on Accommodations.

2009-2010 General Assembly

Committee: Revenue Laws Study Committee
Introduced by:
Analysis of: 2009-SVxz-19

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SUMMARY: *This proposal would require online travel companies to report to providers of accommodations with whom they contract the final sales price charged to a customer for the rental of accommodations for purposes of determining the amount of State and local sales tax and local occupancy tax due. The proposal is not, however, limited only to online companies. Any person who is authorized by the provider of an accommodation to facilitate the rental of and to collect payment for an accommodation would be considered a "retailer" for purposes of determining the sales price. Under the proposal, a facilitator would be required to report the sales price to the provider and would only become liable for the tax due if it understates or fails to report the sales price to the provider. The proposal also clarifies that the rental of a transient accommodation, whether through the provider or a facilitator, is sourced to the location of the accommodation.*

CURRENT LAW: Gross receipts derived from the rental of transient accommodations are subject to State and local sales tax at the general rate, which is currently 7.75% in most counties. Many counties (over 70) and cities (over 85) also levy an occupancy tax on accommodations, with rates ranging from 1% to 6%. The tax does not apply to any private residence or cottage rented for less than 15 days in a calendar year or to any lodging supplied to the same person for 90 or more continuous days.

Deemed "retailers" under the Sales Tax Article, operators of hotels, motels, tourist homes, tourist camps, and similar type businesses and persons who rent private residences and cottages to transients are required to collect and remit the tax due. This includes rental agents or real estate brokers who rent private residences or cottages to transients on behalf of the owners. However, under the plain language of the statute, online intermediaries that list available rooms and collect payment for the rental of those rooms are not retailers required to collect State sales tax on accommodations because they are not "operators" of those accommodations. This interpretation was the holding in the Fourth Circuit case of Pitt County v. Hotels.com.

Generally speaking, a person who wishes to make a reservation for accommodations may contact the accommodation directly, use the services of a commissioned travel agent, or make reservations through an online "intermediary," such as Expedia or Travelocity. Intermediaries contract with accommodation providers for the right to facilitate the reservation of that provider's rooms on their website. The intermediaries have no ownership interest or legal right to the rooms, nor do they bear any risk of loss if rooms are not booked through their site. Under the contract, an intermediary agrees to pay the provider a discounted room rate and then adds a "facilitation fee" or other similarly-named charge to the discounted room rate and also collects an amount that reflects anticipated taxes plus a nominal service or processing fee. Generally speaking, the facilitation fee is not disclosed to the customer or to the provider, and the amount collected for "taxes and fees" is not itemized.

With regard to payment, a consumer who books with the provider directly or uses a travel agent typically provides the hotel or agent with a credit card number to guarantee the reservation and then pays the hotel directly at the time of check-out. A consumer who books through an intermediary pays up front and prior to occupancy. This business model is known as the "merchant model" or the "prepaid model." Under this model, once the customer occupies the room, the provider bills the intermediary for

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the discounted room rate plus State and local sales tax and occupancy tax, if applicable, based on that rate. Since the provider does not know the final room rate paid by the customer, it cannot collect sales and occupancy tax based on that amount.

For the most part, intermediaries agree that they must pay the providers sales tax and occupancy tax based on the discounted room rate they have negotiated. The source of debate is to what extent intermediaries may be required to collect sales tax and occupancy tax based on the marked-up rate that they ultimately charge consumers for the rental of an accommodation, which includes their service fees.

BILL ANALYSIS: This proposal does the following:

- It provides that the State sales tax on accommodations applies to the sales price of the rental and to other gross receipts derived from that rental. "Sales price" is currently defined as the total amount or consideration for which tangible personal property, digital property, or services are sold, leased, or rented and it essentially includes the retailer's costs as well as charges for any services necessary to complete the sale. For purposes of the sales tax on accommodations, the proposal provides that the sales price will be determined as if the rental of the accommodation is a service.
- It provides that a person, other than a rental agent, who, by written contract, is authorized to facilitate the rental of and collect payment for the rental of accommodations is considered a retailer for purposes of determining the sales price of the accommodation. The rationale for incorporating the term "sales price" and deeming a facilitator to be a retailer for purposes of calculating the sales price is to capture the total cost paid by the consumer for an accommodation regardless of whether it is paid to a hotel directly or to a third party that charges facilitation or other service fees in addition to the room rate.
- It requires a person who enters into a contract with the provider of an accommodation to facilitate the rental of accommodations to report the sales price to the provider of the accommodation. The provider is required to remit tax on the sales price reported by the facilitator. The facilitator is not liable for the tax due unless it underreports or fails to report the tax due.
- It codifies the current practice with regard to sourcing transactions for the rental of transient accommodations by stating that they are sourced to the location of the accommodation.
- It makes conforming changes to the statute that sets out the uniform provisions for occupancy taxes. In doing so, it imposes the same responsibility and liability on a person who facilitates the rental of an accommodation with regard to occupancy tax as that person would have for State sales tax on accommodations. It also makes clear that the room occupancy tax applies to the same gross receipts and is calculated in the same manner as the State sales tax on accommodations.

EFFECTIVE DATE: This act would become effective January 1, 2011, and apply to gross receipts derived from accommodations provided on or after that date.

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